BOHM, MATSEN, KEGEL & AGUILERA, LLP Kari M. Myron (Bar No. 158592) Matthew J. Salcedo (Bar No. 237866) 695 Town Center Drive, Ste. 700 3 Costa Mesa, California 92626 Telephone: (714) 384-6500 Facsimile: (714) 384-6501 5 kmyron@bmkalaw.com 6 Attorneys for Plaintiff STEVEN BENHAYON 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 STEVEN BENHAYON, an Individual, Case No.: CV08-06090 FMC (AGRx) Assigned to Hon. Florence-Marie 12 Plaintiff, Cooper [Courtroom 750 (Roybal)] 13 VS. PLAINTIFF'S RESPONSE TO 14 **DEFENDANTS' SEPARATE** ROYAL BANK OF CANADA, a Canadian 15 STATEMENT OF company, business form unknown; RBC UNCONTROVERTED FACTS AND 16 WEALTH MANAGEMENT COMPANY, **CONCLUSIONS OF LAW** formerly RBC DAIN RAUSCHER, INC., 17 l business form unknown; THE ROYAL 18 [Filed Concurrently with Plaintiff's Reply BANK OF CANADA US WEALTH Brief Re: ERISA Issues and Plaintiff's ACCUMULATION PLAN, formerly known 19 Separate Statement of Genuine Issues of **RBC** Dain Rauscher Wealth 20 Material Fact1 Accumulation Plan; and, DOES 1 through 20, 21 DATE: Not set. 22 Not set. TIME: Defendants. CTRM: Not set. 23 24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN: 25 Plaintiff STEVEN BENHAYON hereby submits the following Response to 26 Defendants' Separate Statement of Uncontroverted Material Facts and Supporting 27 Evidence in support of their Motion for Partial Summary Judgment pursuant to 28

Federal Rule of Civil Procedure, Rule 56.

PRELIMINARY STATEMENT

On July 31, 2009, Plaintiff filed an *Ex Parte* Application for an Order Continuing the ERISA Reply Brief Due Date, or, in the Alternative, for an Order Shortening Time To Depose RBC's PMK and Shortening Time for RBC to Respond to Request for Production of Documents at Time of PMK Deposition. In a good faith effort to comply with this Court's Simultaneous Briefing Order and to preserve its rights in this litigation, Plaintiff hereby submits this Response to Defendants' Separate Statement of Uncontroverted Material Facts and Supporting Evidence. In so doing, Plaintiff does not waive its rights or arguments contained in the *Ex Parte* Application.

DEFENDANTS' ALLEGED UNCONTROVERTED FACTS

SUPPORTING EVIDENCE

DISPUTED IN PART.

PLAINTIFF'S RESPONSE AND

1. The Royal Bank of Canada U.S. Wealth Accumulation Plan (the "WAP") is a non-tax qualified, deferred compensation plan for a select group of management or highly-compensated employees of the Royal Bank of Canada and its participating subsidiaries (collectively "RBC").

The WAP does not cover a select group of management or highly-compensated employees of RBC. (AA 009.)

Objections:

Assumes facts not in evidence — to wit, that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP participants far exceeds the amount of employees permissible to constitute a "select group" under *Duggan v. Hobbs*, 99 F.3d 307 (9th Cir. 1996), *Darden v.*

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		Nationwide Mut. Ins. Co., 796 F.2d 701
4		(4th Cir. 1986) <i>aff'd</i> , 922 F.2d 203 (4th
		Cir. 1991), rev'd on other grounds, 503
5		U.S. 318 (1992), Pane v. RCA Corp.,
6		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i> v. <i>Rowe Furniture Corp.</i> , 571 F. Supp.
7		1249 (D.C. MD. 1983). Second, the
8		WAP participants did not have the
9		necessary bargaining power to affect or
10		substantially influence the terms and
		conditions of the WAP under <i>Duggan v. Hobbs</i> , <i>supra</i> , <i>Carrabba v. Randalls</i>
11		Food Markets, Inc., 38 F.Supp.2d 468
12		(N.D. Tex. 1999). Third, the WAP was
13		not a completely "unfunded" plan as it
14		mandated contributions by its employee participants (e.g., Mandatory Deferred
15		Compensation), which were not
16		contributed by RBC, and did not come
17		from RBC's general assets, as required
		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
18		Corp., 571 F. Supp. 1249, 1251 (D.C.
19		Md. 1983), Miller v. Eichleay Engineers,
20		Inc., 886 F.2d 30 (3d Cir. 1989), and
21		Crumley v. Stonhard, Inc., 920 F. Supp. 589 (D.C. N.J. 1996).
22		00/ (200, 11.0, 1770).
23	2. The WAP is administered by a	UNDISPUTED.
24	committee established under the WAP	Ohioatione
25	Plan Document (the "WAP Committee").	Objections:
	,	Irrelevant to the issue of whether the
26		WAP is a top hat plan as defined under
27		29 U.S.C. §§ 1051(2), 1081(a)(3),
28		1101(a)(1).

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
2		
3		Irrelevant to the issue of whether the
4		WAP was set up in bad faith in that it fails to address the vesting and
5		distributions of WAP benefits to
6		participants who are terminated without
7		cause.
8	3. The WAP Committee has the full	UNDISPUTED.
9	power and sole discretionary authority to	
10	make all determinations provided for in the Plan.	Objections:
11	uic Fiaii.	Irrelevant to the issue of whether the
		WAP is a top hat plan as defined under
12		29 U.S.C. §§ 1051(2), 1081(a)(3),
13		1101(a)(1).
14		Irrelevant to the issue of whether the
15		WAP was set up in bad faith in that it
16		fails to address the vesting and distributions of WAP benefits to
17		participants who are terminated without
18		cause.
19	4. Benefits under the WAP are	DISPUTED.
20	unfunded and are paid as needed solely	DISPUTED.
21	from the general assets of the Royal	The WAP is not a completely
22	Bank of Canada or one of its participating subsidiaries.	"unfunded" plan as it mandated
23	participating substanties.	contributions by its employee participants (e.g., Mandatory Deferred
li li		Compensation), which were not
24	·	contributed by RBC, and did not come
25		from RBC's general assets. (SAA 00056-00072; AA 010-029.)
26		0000 000/m, IMI 010 0m/.)
27		
28		

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		Objections:
		Sojections.
4		Assumes facts not in evidence – to wit,
5		that the WAP was not a completely
6		"unfunded" plan as it mandated contributions by its employee
7		participants (e.g., Mandatory Deferred
8		Compensation), which were not
9		contributed by RBC, and did not come from RBC's general assets, as required
10		under 29 U.S.C. §§ 1051(2), 1081(a)(3),
11		1101(a)(1), Belka v. Rowe Furniture
12		Corp., 571 F. Supp. 1249, 1251 (D.C.
13		Md. 1983), <i>Miller v. Eichleay Engineers</i> , <i>Inc.</i> , 886 F.2d 30 (3d Cir. 1989), and
14		Crumley v. Stonhard, Inc., 920 F. Supp.
		589 (D.C. N.J. 1996).
15	5. The WAP provides that employees	DISPUTED IN PART.
16	are eligible to participate in the WAP	
17	only if they are part of the select group	The WAP does not cover a select group
18	of management or highly compensated employees of RBC whose compensation	of management or highly-compensated employees of RBC. (AA 009.)
19	or production otherwise exceeds a level	employees of RBC. (AA 009.)
20	demand appropriate by the WAP	Objections:
21	Committee and who are invited to	Annual facts and in 11
22	become participants by the WAP Committee.	Assumes facts not in evidence – to wit, that the WAP is a "top hat" plan as
23		defined under 29 U.S.C. §§ 1051(2),
24		1081(a)(3), 1101(a)(1). The WAP is not
}		a "top hat" plan as defined under 29
25		U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP
26		participants far exceeds the amount of
27		employees permissible to constitute a
28		"select group" under Duggan v. Hobbs,
		i

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
3		99 F.3d 307 (9th Cir. 1996), <i>Darden v</i> .
4		Nationwide Mut. Ins. Co., 796 F.2d 701
İ		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th
5		Cir. 1991), rev'd on other grounds, 503
6		U.S. 318 (1992), Pane v. RCA Corp.,
7		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i> v. <i>Rowe Furniture Corp.</i> , 571 F. Supp.
8		1249 (D.C. MD. 1983). Second, the
		WAP participants did not have the
9		necessary bargaining power to affect or
10		substantially influence the terms and
11		conditions of the WAP under <i>Duggan v</i> .
12		Hobbs, supra, Carrabba v. Randalls
13		Food Markets, Inc., 38 F.Supp.2d 468 (N.D. Tex. 1999). Third, the WAP was
		not a completely "unfunded" plan as it
14		mandated contributions by its employee
15		participants (e.g., Mandatory Deferred
16		Compensation), which were not
17		contributed by RBC, and did not come
		from RBC's general assets, as required
18		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
19		Corp., 571 F. Supp. 1249, 1251 (D.C.
20		Md. 1983), Miller v. Eichleay Engineers,
21		Inc., 886 F.2d 30 (3d Cir. 1989), and
		Crumley v. Stonhard, Inc., 920 F. Supp.
22		589 (D.C. N.J. 1996).
23	6. On March 13, 2001, a statement	DISPUTED.
24	was filed with the United States	DIST UTED.
25	Department of Labor registering the	On March 13, 2001, RBC filed a
26	WAP as a "top-hat" plan within the	statement with the United States
	meaning of 28 C.F.R. 2520.104-23.	Department of Labor in order to satisfy
27		the reporting requirements of 28 C.F.R.
28		2520.104-23, should the WAP be

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3 4		considered a pension plan under ERISA. The statement was not filed with the
5		United States Department of Labor registering the WAP as a "top-hat" plan
6		within the meaning of 28 C.F.R.
7		2520.104-23. (AA 009.)
8		Objections:
9		Assumes facts not in evidence – to wit,
10		that the WAP is a "top hat" plan as
11		defined under 29 U.S.C. §§ 1051(2),
12		1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29
13		U.S.C. §§ 1051(2), 1081(a)(3),
14		1101(a)(1). First, the number of WAP
		participants far exceeds the amount of
15		employees permissible to constitute a "select group" under <i>Duggan v. Hobbs</i> ,
16		99 F.3d 307 (9th Cir. 1996), <i>Darden v</i> .
17		Nationwide Mut. Ins. Co., 796 F.2d 701
18		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th
19		Cir. 1991), rev'd on other grounds, 503
20		U.S. 318 (1992), <i>Pane v. RCA Corp.</i> , 868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
21		v. Rowe Furniture Corp., 571 F. Supp.
		1249 (D.C. MD. 1983). Second, the
22		WAP participants did not have the
23		necessary bargaining power to affect or substantially influence the terms and
24		conditions of the WAP under <i>Duggan v</i> .
25		Hobbs, supra, Carrabba v. Randalls
26		Food Markets, Inc., 38 F.Supp.2d 468
27		(N.D. Tex. 1999). Third, the WAP was not a completely "unfunded" plan as it
- 11		mandated contributions by its employee
28		,p ,

1	DEFENDANTS' ALLEGED LINCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		participants (e.g., Mandatory Deferred
4		Compensation), which were not
5		contributed by RBC, and did not come from RBC's general assets, as required
6		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
7		Corp., 571 F. Supp. 1249, 1251 (D.C.
8		Md. 1983), Miller v. Eichleay Engineers,
9		Inc., 886 F.2d 30 (3d Cir. 1989), and Crumley v. Stonhard, Inc., 920 F. Supp.
10		589 (D.C. N.J. 1996).
11	7. The amounts credited to a	UNDISPUTED.
12	participant's individual account consist	
13	of: (i) voluntary deferrals of cash	Objections:
14	compensation ("Voluntary Deferred Compensation"), (ii) mandatory deferrals	Irrelevant to the issue of whether the
15	of cash compensation ("Mandatory	WAP is a top hat plan as defined under
16	Deferred Compensation"), and (iii)	29 U.S.C. §§ 1051(2), 1081(a)(3),
17	company matching contributions and bonuses ("Company Contributions").	1101(a)(1).
18	contacts (company contributions).	Irrelevant to the issue of whether the
19		WAP was set up in bad faith in that it
20		fails to address the vesting and distributions of WAP benefits to
21		participants who are terminated without
22		cause.
23	8. Any participant who disagrees	UNDISPUTED.
24	with any determination that has been	
25	made for payment under the WAP may present a claim to the WAP Committee	Objections:
26	and, if said claim is denied, may request	Irrelevant to the issue of whether the
- 11	a further review of the claim.	WAP is a top hat plan as defined under
27 28		29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).

1	DEFENDANTS' ALLEGED UNCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE
2		
3		T
4 5		Irrelevant to the issue of whether the WAP was set up in bad faith in that it
		fails to address the vesting and distributions of WAP benefits to
6		participants who are terminated without
7		cause.
8	9. All decisions on claims and	DISPUTED.
9	reviews of denied claims are made by the	
10	WAP Committee.	As indicated at AA 301, non-WAP
11		Committee members Gabriela Sikich and Todd Schnell were present at the
12		Committee meeting to review Steven
13		Benhayon's claim for benefits under the
14		WAP. As RBC has provided 24 blank pages marked "REDACTED" and
15		"CONFIDENTIAL," Plaintiff disputes
16		this alleged uncontroverted fact on the grounds that if said minutes become
17		unveiled later in this litigation, Plaintiff
18		submits that such minutes may demonstrate that non-WAP Committee
19		members Gabriela Sikich and Todd
20		Schnell participated in the review and
21		decision of Steven Benhayon's claim for benefits under the WAP. (AA 301.)
22		ocherio unuci die WAF. (AA 501.)
23		Objections:
24		Assumes facts not in evidence – to wit,
25		that the WAP is a "top hat" plan as
26		defined under 29 U.S.C. §§ 1051(2),
27		1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29
28		U.S.C. §§ 1051(2), 1081(a)(3),
20		

1	DEFENDANTS' ALLEGED UNCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE
2		
3		1101(a)(1). First, the number of WAP
4		participants far exceeds the amount of
5		employees permissible to constitute a "select group" under <i>Duggan v. Hobbs</i> ,
6		99 F.3d 307 (9th Cir. 1996), <i>Darden v</i> .
		Nationwide Mut. Ins. Co., 796 F.2d 701
7		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th
8		Cir. 1991), rev'd on other grounds, 503
9		U.S. 318 (1992), Pane v. RCA Corp.,
10		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i> v. <i>Rowe Furniture Corp.</i> , 571 F. Supp.
11		1249 (D.C. MD. 1983). Second, the
		WAP participants did not have the
12		necessary bargaining power to affect or
13		substantially influence the terms and
14	ı 	conditions of the WAP under <i>Duggan v. Hobbs</i> , <i>supra</i> , <i>Carrabba v. Randalls</i>
15		Food Markets, Inc., 38 F.Supp.2d 468
16		(N.D. Tex. 1999). Third, the WAP was
17		not a completely "unfunded" plan as it
		mandated contributions by its employee participants (e.g., Mandatory Deferred
18		Compensation), which were not
19		contributed by RBC, and did not come
20		from RBC's general assets, as required
21		under 29 U.S.C. §§ 1051(2), 1081(a)(3),
22	·	1101(a)(1), Belka v. Rowe Furniture Corp., 571 F. Supp. 1249, 1251 (D.C.
23		Md. 1983), Miller v. Eichleay Engineers,
		Inc., 886 F.2d 30 (3d Cir. 1989), and
24		Crumley v. Stonhard, Inc., 920 F. Supp.
25		589 (D.C. N.J. 1996).
26		
27		
28		
20		

1 2 3 4 5 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

DEFENDANTS' ALLEGED UNCONTROVERTED FACTS

10. The WAP provides that "Mandatory Deferred Compensation and Company Contributions in a participant's account shall vest on the date or dates determined by the Committee, in its sole discretion."

PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE

DISPUTED IN PART.

The 2003 WAP Plan does not recognize an exception to accelerated vesting or forfeiture of benefits upon an employee's separation from RBC employment due to termination without cause. (SAA 0056-00027.)

Objections:

Assumes facts not in evidence – to wit. that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP participants far exceeds the amount of employees permissible to constitute a "select group" under Duggan v. Hobbs, 99 F.3d 307 (9th Cir. 1996), Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986) aff'd, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503 U.S. 318 (1992), Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989), and Belka v. Rowe Furniture Corp., 571 F. Supp. 1249 (D.C. MD. 1983). Second, the WAP participants did not have the necessary bargaining power to affect or substantially influence the terms and conditions of the WAP under Duggan v. Hobbs, supra, Carrabba v. Randalls Food Markets, Inc., 38 F.Supp.2d 468 (N.D. Tex. 1999). Third, the WAP was

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
2		
3		not a completely "unfunded" plan as it
4		mandated contributions by its employee participants (e.g., Mandatory Deferred
5		Compensation), which were not
6		contributed by RBC, and did not come
7		from RBC's general assets, as required
8		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
		Corp., 571 F. Supp. 1249, 1251 (D.C.
9		Md. 1983), Miller v. Eichleay Engineers,
10		Inc., 886 F.2d 30 (3d Cir. 1989), and
11		Crumley v. Stonhard, Inc., 920 F. Supp. 589 (D.C. N.J. 1996).
12		305 (2.0.11.0.1550).
13	11. Except as expressly set forth in the	UNDISPUTED.
14	WAP Plan Document, "all Company	
15	Contributions and Mandatory Deferred Compensation that are not vested on the	
16	participant's employment termination	
	date shall be deemed forfeited, and such	
17	participant's account shall be	
18	appropriately reduced."	
19	[NOT NUMBERED]	DISPUTED.
20	The WAP plan document provides only	
21	three exceptions to the rule that unvested Company Contributions and Mandatory	The 2003 WAP Plan only recognizes
22	Deferred Compensation are deemed	forfeiture of matching contributions and Mandatory Deferred Compensation if a
23	forfeited upon termination of the	participant ceases to be an employee by
24	participant's employment (i) Mandatory	RBC due to his gross or willful
<u>il</u>	Deferred Compensation and Company Contributions vest immediately upon the	misconduct during the course of his
25	death or qualifying disability of a	employment, including theft or commission of a gross misdemeanor or
26	participant; (ii) Mandatory Deferred	felony. (SAA 00062.)
27	Compensation and Company	
28	Contributions vest immediately upon the	

1 2

345

6 7 8

9 10

1213

11

1415

16 17

18

19

2021

22

2324

25

2627

28

DEFENDANTS' ALLEGED UNCONTROVERTED FACTS

retirement of a participant who has satisfied the requirements for retirement under the WAP; and (iii) Mandatory Deferred Compensation (but not Company Contributions) vest in full in the event a participant ceases to be employed due to an organizational restructuring (as determined in the sole discretion of the WAP Committee).

PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE

Objections:

Assumes facts not in evidence – to wit, that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP participants far exceeds the amount of employees permissible to constitute a "select group" under Duggan v. Hobbs, 99 F.3d 307 (9th Cir. 1996), Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986) aff'd, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503 U.S. 318 (1992), Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989), and Belka v. Rowe Furniture Corp., 571 F. Supp. 1249 (D.C. MD. 1983). Second, the WAP participants did not have the necessary bargaining power to affect or substantially influence the terms and conditions of the WAP under Duggan v. Hobbs, supra, Carrabba v. Randalls Food Markets, Inc., 38 F.Supp.2d 468 (N.D. Tex. 1999). Third, the WAP was not a completely "unfunded" plan as it mandated contributions by its employee participants (e.g., Mandatory Deferred Compensation), which were not contributed by RBC, and did not come from RBC's general assets, as required under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture Corp., 571 F. Supp. 1249, 1251 (D.C.

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
1	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
2		
3		Md. 1983), <i>Miller v. Eichleay Engineers</i> , <i>Inc.</i> , 886 F.2d 30 (3d Cir. 1989), and
5		Crumley v. Stonhard, Inc., 920 F. Supp. 589 (D.C. N.J. 1996).
6		
7	12. Benhayon's notional account balance under the WAP was \$334,220.03	UNDISPUTED.
8	at the time his employment with RBC terminated on September 17, 2007.	Objections:
9	1	Irrelevant to the issue of whether the
10 11		WAP is a top hat plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3),
12		1101(a)(1).
13		Irrelevant to the issue of whether the
14		WAP was set up in bad faith in that it
15		fails to address the vesting and distributions of WAP benefits to
16		participants who are terminated without
17		cause.
18	13. The \$334,220.03 remaining in	DISPUTED.
19	Benhayon's WAP account on September 17, 2007 was entirely attributable to an	As indicated at AA 002, portions of the
20	"Employer Match" contribution for plan	\$334,220.03 derived from dividends
21	year 2003 and FICM WAP Bonus" contributions for plan years 2003	income and interest accrued on account funds invested in Blended Fund
22	through 2006.	Investments. (AA 002.)
23		Objections:
24		Objections:
25		Assumes facts not in evidence – to wit,
26		that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2),
27		1081(a)(3), 1101(a)(1). The WAP is not
28		a "top hat" plan as defined under 29

1	DEFENDANTS' ALLEGED UNCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND
2		SUPPORTING EVIDENCE
3	The state of the s	U.S.C. §§ 1051(2), 1081(a)(3),
4		1101(a)(1). First, the number of WAP
5		participants far exceeds the amount of
		employees permissible to constitute a "select group" under <i>Duggan v. Hobbs</i> ,
6		99 F.3d 307 (9th Cir. 1996), <i>Darden v</i> .
7		Nationwide Mut. Ins. Co., 796 F.2d 701
8		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th
9		Cir. 1991), rev'd on other grounds, 503
10		U.S. 318 (1992), <i>Pane v. RCA Corp.</i> , 868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
11		v. Rowe Furniture Corp., 571 F. Supp.
		1249 (D.C. MD. 1983). Second, the
12		WAP participants did not have the
13		necessary bargaining power to affect or
14		substantially influence the terms and conditions of the WAP under <i>Duggan</i> v.
15		Hobbs, supra, Carrabba v. Randalls
16		Food Markets, Inc., 38 F.Supp.2d 468
17		(N.D. Tex. 1999). Third, the WAP was
		not a completely "unfunded" plan as it mandated contributions by its employee
18		participants (e.g., Mandatory Deferred
19		Compensation), which were not
20		contributed by RBC, and did not come
21		from RBC's general assets, as required
22		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
23		Corp., 571 F. Supp. 1249, 1251 (D.C.
		Md. 1983), Miller v. Eichleay Engineers,
24		Inc., 886 F.2d 30 (3d Cir. 1989), and
25		Crumley v. Stonhard, Inc., 920 F. Supp. 589 (D.C. N.J. 1996).
26		200 (D.C. 11.0. 1770).
27		
28		

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3	14. The "Employer Match"	UNDISPUTED.
4	contribution to Benhayon's WAP	
5	account for plan year 2003 was subject to four-year cliff vesting.	Objections:
6	to four-year chiri vesting.	Irrelevant to the issue of whether the
7		WAP is a top hat plan as defined under
8		29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).
		Irrelevant to the issue of whether the
9		WAP was set up in bad faith in that it
10		fails to address the vesting and distributions of WAP benefits to
11		participants who are terminated without
12		cause.
13	15. The "FICM WAP Bonus"	UNDISPUTED.
14	contributions to Benhayon's WAP	ONDIST CIED.
15	account for plan years 2003 through	Objections:
16	2006 were subject to four-year cliff vesting.	Irrelevant to the issue of whether the
17	, voting.	WAP is a top hat plan as defined under
18		29 U.S.C. §§ 1051(2), 1081(a)(3),
19		1101(a)(1).
20		Irrelevant to the issue of whether the
21		WAP was set up in bad faith in that it
22		fails to address the vesting and distributions of WAP benefits to
23		participants who are terminated without
24		cause.
25		
26		
27		
28		
- 11		

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3	16. Unless otherwise provided by the	UNDISPUTED.
4	WAP Committee, all vesting periods	
5	begin on January 1 of the plan year following the plan year for which the	Objections:
6	contribution was made.	Irrelevant to the issue of whether the
7		WAP is a top hat plan as defined under
8		29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).
9		
10		Irrelevant to the issue of whether the WAP was set up in bad faith in that it
11		fails to address the vesting and
12		distributions of WAP benefits to participants who are terminated without
13		cause.
14	17. The Employer Match contribution	UNDISPUTED.
15	to Benhayon's WAP account for plan	UNDISTUTED.
16	year 2003 was scheduled to vest January 1, 2008.	Objections:
17	1, 2006.	Irrelevant to the issue of whether the
18		WAP is a top hat plan as defined under
19		29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).
20		
21		Irrelevant to the issue of whether the WAP was set up in bad faith in that it
22		fails to address the vesting and
23		distributions of WAP benefits to
24		participants who are terminated without cause.
25		
26		
27		
28		

	<u>DEFENDANTS' ALLEGED</u> <u>UNCONTROVERTED FACTS</u>	PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE
	18. The FICM WAP Bonus contributions to Benhayon's WAP	UNDISPUTED.
	account for plan years 2003-2006 were scheduled to vest on January 1 st of years	Objections:
	2008-2011, respectively.	Irrelevant to the issue of whether the
i	, 1	WAP is a top hat plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3),
IJ		1101(a)(1).
		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it fails to address the vesting and
		distributions of WAP benefits to
		participants who are terminated without cause.
	19. Benhayon's employment with	DISPUTED IN PART.
	RBC ended on September 17, 2007.	Steven Benhayon was terminated
		without cause from RBC on September 17, 2007. (AA 072, 074-075.)
		Objections:
		Irrelevant to the issue of whether the
		WAP is a top hat plan as defined under
		29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).
	20 P 1 111	
	20. Benhayon did not separate from employment with RBC due to a death,	UNDISPUTED.
	disability or retirement.	Objections:
		Irrelevant to the issue of whether the
		WAP is a top hat plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3),

UNCONTROVERTED FACTS SUPPORTING EVIDENCE 1101(a)(1). Irrelevant to the issue of whether the WAP was set up in bad faith in that it fails to address the vesting and distributions of WAP benefits to participants who are terminated withor cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defit under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencion or after January 1, 2001, whose aguenon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as defined under the Plan as the participant's non-competition agreement or termination of employment of a participant who (i) has been an emploof the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencion or after January 1, 2001, whose aguence with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as defin			district the second
1101(a)(1). Irrelevant to the issue of whether the WAP was set up in bad faith in that it fails to address the vesting and distributions of WAP benefits to participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defit under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relat agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as "the retirement" is defit under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement in the participant's non-competition agreement in a form approved by the company.	1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
Irrelevant to the issue of whether the WAP was set up in bad faith in that it fails to address the vesting and distributions of WAP benefits to participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is definuder the Plan as "the retirement or termination of employment of a participant who (i) has been an emploof the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relar agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencion or after January 1, 2001, whose aguing Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	2	<u>UNCONTROVERTED FACTS</u>	<u>SUPPORTING EVIDENCE</u>
Irrelevant to the issue of whether the WAP was set up in bad faith in that it fails to address the vesting and distributions of WAP benefits to participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is definuder the Plan as "the retirement or termination of employment of a participant who (i) has been an emploof the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relar agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencion or after January 1, 2001, whose aguing Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	3		1101(a)(1).
Irrelevant to the issue of whether the WAP was set up in bad faith in that it fails to address the vesting and distributions of WAP benefits to participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an employ of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nocompetition, non-solicitation and relar agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencion or after January 1, 2001, whose aguing Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant to the issue of whether the WAP is a top hat plan as defined under			
fails to address the vesting and distributions of WAP benefits to participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an employ of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a noncompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose aga upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participant or termination of employment of a participant who (i) has been an emplo of the Company or any participant or termination of employment or a non-competition and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose aga upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company.			
distributions of WAP benefits to participants who are terminated withor cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a non-competition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defining under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participanting subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a non-competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the participants to the issue of whether the WAP is a top hat plan as defined under the participants who (ii) has been an emplo of the Company or any participant who (i) has been an emplo of the Company or any participant who (ii) has entered into a non-competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company.			-
participants who are terminated without cause. 21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is definited under the Plan as "the retirement or termination of employment of a participant who (i) has been an emploing of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a noncompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment of a participant who (ii) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment of a participant who (i) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who (ii) has been an emplo of the Company or any participant who			
21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an emploof the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a noncompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under			participants who are terminated without
21. Under the terms of the WAP, an approved retirement requires that the Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defined under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a noncompetition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose aguing subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as "the retirement" is defined to termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose aguing on Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company.	11		cause.
Participant execute either a business transition agreement or a noncompetition and non-solicitation agreement. At page 6 of the 2003 WAP (SAA 00061), "approved retirement" is defit under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nor competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under the Plan as "the retirement" is defit under the Plan as "the retirement" is defit under the Plan as "the retirement or termination of employment, (ii) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a nor competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agupon Separation or termination of terminat	9	21. Under the terms of the WAP, an	UNDISPUTED.
transition agreement or a non- competition and non-solicitation agreement. 12 13 14 15 16 17 18 19 20 21 21 22 23 24 25 27 28 29 20 21 Transition agreement or a non- competition and non-solicitation agreement. 20 21 22 23 24 25 26 27 28 29 20 20 21 21 22 23 24 25 26 27 28 29 20 20 20 21 21 22 23 24 25 26 27 28 29 20 20 20 21 21 22 23 24 25 26 27 28 29 29 20 20 20 21 20 21 21 22 23 24 25 26 27 28 29 20 20 20 21 21 22 23 24 25 26 27 28 29 20 20 20 21 21 22 23 24 25 26 27 28 29 29 20 20 20 21 21 21 22 23 24 25 26 27 28 29 29 20 20 20 21 21 22 23 24 25 26 27 28 29 29 20 20 20 20 21 21 22 23 24 25 26 27 28 29 29 20 20 20 20 21 20 21 21 21 22 23 24 25 26 27 28 29 29 20 20 20 21 20 21 21 21 22 23 24 25 26 27 27 28 29 29 20 20 20 20 20 21 21 20 21 21 21 22 23 24 25 26 27 27 28 28 29 29 20 20 20 20 21 20 21 21 21 22 23 24 25 26 27 28 29 29 20 20 20 20 20 20 20 20 21 20 20 21 21 20 20 21 21 21 22 23 24 25 26 27 28 29 29 20 20 20 20 20 20 20 20 20 20 20 20 20	10	-	
competition and non-solicitation agreement. under the Plan as "the retirement or termination of employment of a participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a not competition, non-solicitation and relat agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	11	1	· ·
participant who (i) has been an emplo of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a not competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose again upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	12		
of the Company or any participating subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a not competition, non-solicitation and relating agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose aguingon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	13	agreement.	<u> </u>
subsidiary for 10 or more years at the time of separation or termination of employment, (ii) has entered into a not competition, non-solicitation and related agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agrupon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	14		,
time of separation or termination of employment, (ii) has entered into a not competition, non-solicitation and related agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a tleast fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	15		
competition, non-solicitation and related agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose agreement in a form approved by the Committee and (iii) with respect to a form approved by th	16		time of separation or termination of
agreement in a form approved by the Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose age upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	17		
Committee and (iii) with respect to deferrals for all Plan years commencing on or after January 1, 2001, whose again upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	18		-
20 21 22 22 23 24 25 26 27 28 29 20 20 20 21 20 21 21 22 22 23 24 25 26 27 28 29 20 20 20 21 20 21 21 22 22 23 24 25 26 27 28 29 20 20 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 21 21 22 22 23 24 25 26 27 27 28 29 20 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 21 21 22 22 23 24 25 26 27 27 28 29 20 20 21 20 20 20 20 20 20 20 20 20 20 20 20 20			Committee and (iii) with respect to
upon Separation is at least fifty (50); provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under	Ш		
provided that such vesting will be subject to forfeiture as set forth in the participant's non-competition agreement with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under			
23 24 25 26 27 28 29 20 20 21 22 23 24 25 26 27 28 29 20 20 20 21 21 22 23 24 25 26 27 28 29 20 20 21 21 22 23 24 25 26 27 27 28 28 29 20 20 20 20 20 20 20 20 20 20 20 20 20			provided that such vesting will be
with the Company. Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under			v
Objections: Objections: Irrelevant to the issue of whether the WAP is a top hat plan as defined under			·
Irrelevant to the issue of whether the WAP is a top hat plan as defined under	24		
27 Irrelevant to the issue of whether the WAP is a top hat plan as defined under	25		Objections:
The state of the s	26		Irrelevant to the issue of whether the
29 U.S.C. §§ 1051(2), 1081(a)(3),			WAP is a top hat plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3),

	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
		1101(-)(1)
		1101(a)(1).
		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it
		fails to address the vesting and
Ш		distributions of WAP benefits to
		participants who are terminated without cause.
	22. There was no evidence in the	UNDISPUTED.
	administrative record that Benhayon ever	
4 8 15	executed a business transition agreement	Objections:
1 11	or a non-competition and non-solicitation agreement.	Irrelevant to the issue of whether the
1	solicitation agreement.	WAP is a top hat plan as defined under
		29 U.S.C. §§ 1051(2), 1081(a)(3),
		1101(a)(1).
		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it
		fails to address the vesting and
		distributions of WAP benefits to
		participants who are terminated without
		cause.
2	23. The \$334,220.03 remaining in	UNDISPUTED.
r 11	Benhayon's WAP account on September	
	17, 2007 was treated by the WAP as a forfeiture.	Objections:
	orenure.	Irrelevant to the issue of whether the
		WAP is a top hat plan as defined under
		29 U.S.C. §§ 1051(2), 1081(a)(3),
		1101(a)(1).
		Irrelevant to the issue of whether the
Ш		WAP was set up in bad faith in that it

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		fails to address the vesting and
4		distributions of WAP benefits to
5		participants who are terminated without cause.
6		
7	24. By letter dated November 9, 2007, Benhayon's counsel, Kari M. Myron,	UNDISPUTED.
8	wrote to certain representatives of RBC,	Objections:
9	requesting an increase in the amount of severance pay offered to Benhayon and	The iggue of severance may is involved.
10	distribution of the balance remaining in	The issue of severance pay is irrelevant to the issue of whether the WAP is a top
11	Benhayon's WAP account.	hat plan as defined under 29 U.S.C. §§
12		1051(2), 1081(a)(3), 1101(a)(1).
13		The issue of severance pay is irrelevant
14		to the issue of whether the WAP was set
15		up in bad faith in that it fails to address the vesting and distributions of WAP
16		benefits to participants who are
17		terminated without cause.
18	25. By letter dated November 12,	UNDISPUTED.
19	2007, Benhayon's counsel wrote to	
20	certain representatives of the WAP, requesting that "the WAP Committee	Objections:
21	accelerate[] vesting of any/all funds on	Irrelevant to the issue of whether the
22	deposit in [Benhayon's] WAP account,	WAP is a top hat plan as defined under
23	which are estimated to be \$335,000.00."	29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).
24		
25		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it fails to address the vesting and
26		distributions of WAP benefits to
27		participants who are terminated without cause.
- []		

	I
1	İ
2	
3	
4	
5	
6	
7	
8	
9	
10	Ì
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	١

DEFENDANTS' ALLEGED UNCONTROVERTED FACTS

26. On December 7, 2007, the WAP Committee met and considered Benhayon's request for accelerated vesting of the amount credited to his WAP account at the time of his termination.

PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE

DISPUTED IN PART.

As indicated at AA 296, non-WAP Committee members Gabriela Sikich and Todd Schnell were present at the Committee meeting to review Steven Benhayon's request for accelerated vesting of the amount credited to his WAP account. A portion of the document is blank and marked "REDACTED." Plaintiff disputes this alleged uncontroverted fact (should this document in its entirety become unveiled later in this litigation) on the grounds that non-WAP Committee members Gabriela Sikich and Todd Schnell participated in the review and decision of Steven Benhayon's claim for benefits under the WAP. (AA 296.)

Objections:

Assumes facts not in evidence – to wit, that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The WAP is not a "top hat" plan as defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP participants far exceeds the amount of employees permissible to constitute a "select group" under *Duggan v. Hobbs*, 99 F.3d 307 (9th Cir. 1996), *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701 (4th Cir. 1986) *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd on other grounds*, 503

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		II S 218 (1002) Pane y PCA Com-
		U.S. 318 (1992), <i>Pane v. RCA Corp.</i> , 868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
4		v. Rowe Furniture Corp., 571 F. Supp.
5		1249 (D.C. MD. 1983). Second, the
6		WAP participants did not have the
il		necessary bargaining power to affect or
7		substantially influence the terms and
8		conditions of the WAP under Duggan v.
9		Hobbs, supra, Carrabba v. Randalls
10		Food Markets, Inc., 38 F.Supp.2d 468 (N.D. Tex. 1999). Third, the WAP was
		not a completely "unfunded" plan as it
11		mandated contributions by its employee
12		participants (e.g., Mandatory Deferred
13		Compensation), which were not
$_{14}\parallel$		contributed by RBC, and did not come
15		from RBC's general assets, as required
		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
16		Corp., 571 F. Supp. 1249, 1251 (D.C.
17		Md. 1983), Miller v. Eichleay Engineers,
$_{18}\parallel$		Inc., 886 F.2d 30 (3d Cir. 1989), and
		Crumley v. Stonhard, Inc., 920 F. Supp.
19		589 (D.C. N.J. 1996).
20	27 The WAD Committee designation	DIGDLIEED IN DADE
21	27. The WAP Committee denied Mr. Benhayon's request for accelerated	DISPUTED IN PART.
$_{22}$	vesting of the amount credited to his	As indicated at AA 296, non-WAP
23	WAP account at the time of his	Committee members Gabriela Sikich and
	termination.	Todd Schnell were present at the
24		Committee meeting to review Steven
25		Benhayon's request for accelerated
26		vesting of the amount credited to his
27		WAP account. A portion of the document is blank and marked
Ш		"REDACTED." Plaintiff disputes this
28		Table 1 and

1	<u>DEFENDANTS' ALLEGED</u> UNCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE
2		
3		alleged uncontroverted fact (should this
4		document in its entirety become unveiled
5		later in this litigation) on the grounds that non-WAP Committee members
6		Gabriela Sikich and Todd Schnell
		participated in the review and decision of
7		Steven Benhayon's claim for benefits
8		under the WAP. (AA 296.)
9		Objections:
10		
11		Assumes facts not in evidence – to wit,
12		that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2),
13		1081(a)(3), 1101(a)(1). The WAP is not
14		a "top hat" plan as defined under 29
		U.S.C. §§ 1051(2), 1081(a)(3),
15		1101(a)(1). First, the number of WAP
16		participants far exceeds the amount of employees permissible to constitute a
17		"select group" under Duggan v. Hobbs,
18		99 F.3d 307 (9th Cir. 1996), Darden v.
19		Nationwide Mut. Ins. Co., 796 F.2d 701
20		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503
21		U.S. 318 (1992), Pane v. RCA Corp.,
		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
22		v. Rowe Furniture Corp., 571 F. Supp.
23		1249 (D.C. MD. 1983). Second, the WAP participants did not have the
24		necessary bargaining power to affect or
25		substantially influence the terms and
26		conditions of the WAP under <i>Duggan v</i> .
27		Hobbs, supra, Carrabba v. Randalls Food Markets, Inc., 38 F.Supp.2d 468
		(N.D. Tex. 1999). Third, the WAP was
28		7, 7, 7, 7,

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		not a completely "unfunded" plan as it
4		mandated contributions by its employee
5		participants (e.g., Mandatory Deferred
6		Compensation), which were not contributed by RBC, and did not come
7		from RBC's general assets, as required
8		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
9		Corp., 571 F. Supp. 1249, 1251 (D.C.
10		Md. 1983), Miller v. Eichleay Engineers,
10		Inc., 886 F.2d 30 (3d Cir. 1989), and Crumley v. Stonhard, Inc., 920 F. Supp.
12		589 (D.C. N.J. 1996).
13	28. Benhayon's counsel was advised	DISPUTED IN PART.
14	of the Committee's decision to deny his	DISTOTED INTAKT.
İ	request for accelerated vesting of the	As indicated at AA 296, non-WAP
15	amount credited to his WAP account at the time of his termination by letter dated	Committee members Gabriela Sikich and Todd Schnell were present at the
16	December 11, 2007.	Committee meeting to review Steven
17		Benhayon's request for accelerated
18		vesting of the amount credited to his WAP account. A portion of the
19		document is blank and marked
20		"REDACTED." Plaintiff disputes this alleged uncontroverted fact (should this
21		document in its entirety become unveiled
22		later in this litigation) on the grounds
23		that non-WAP Committee members Gabriela Sikich and Todd Schnell
24		participated in the review and decision of
25		Steven Benhayon's claim for benefits under the WAP. (AA 296.)
26		andor the Will. (11/1 270.)
27		
28		

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		Objections:
4		
5		Assumes facts not in evidence – to wit, that the WAP is a "top hat" plan as
6		defined under 29 U.S.C. §§ 1051(2),
7		1081(a)(3), 1101(a)(1). The WAP is not
		a "top hat" plan as defined under 29
8		U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). First, the number of WAP
9		participants far exceeds the amount of
10		employees permissible to constitute a
11		"select group" under Duggan v. Hobbs,
12		99 F.3d 307 (9th Cir. 1996), <i>Darden v. Nationwide Mut. Ins. Co.</i> , 796 F.2d 701
13		(4th Cir. 1986) aff'd, 922 F.2d 203 (4th
14		Cir. 1991), rev'd on other grounds, 503
		U.S. 318 (1992), Pane v. RCA Corp.,
15		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i> v. <i>Rowe Furniture Corp.</i> , 571 F. Supp.
16		1249 (D.C. MD. 1983). Second, the
17		WAP participants did not have the
18		necessary bargaining power to affect or
19		substantially influence the terms and
20		conditions of the WAP under <i>Duggan v. Hobbs</i> , <i>supra</i> , <i>Carrabba v. Randalls</i>
21		Food Markets, Inc., 38 F.Supp.2d 468
		(N.D. Tex. 1999). Third, the WAP was
22		not a completely "unfunded" plan as it mandated contributions by its employee
23	#	participants (e.g., Mandatory Deferred
24		Compensation), which were not
25		contributed by RBC, and did not come
26		from RBC's general assets, as required under 29 U.S.C. §§ 1051(2), 1081(a)(3),
27		1101(a)(1), Belka v. Rowe Furniture
28		Corp., 571 F. Supp. 1249, 1251 (D.C.

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
2		
3		Md. 1983), Miller v. Eichleay Engineers,
4		Inc., 886 F.2d 30 (3d Cir. 1989), and Crumley v. Stonhard, Inc., 920 F. Supp.
5		589 (D.C. N.J. 1996).
6		
7	29. Also by letter dated December 11,	UNDISPUTED.
	2007, RBC advised Benhayon of his	
8	right to seek review of the WAP	Objections:
9	Committee's decision pursuant to section 7.4 of the WAP Plan Document.	Irrelevant to the issue of whether the
10	The second secon	WAP is a top hat plan as defined under
11		29 U.S.C. §§ 1051(2), 1081(a)(3),
12		1101(a)(1).
13		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it
14		fails to address the vesting and
15		distributions of WAP benefits to
16		participants who are terminated without
17		cause.
18	30. By letter dated February 6, 2008,	UNDISPUTED.
19	Benhayon's counsel submitted a Request	
	For Reconsideration Of Denial Of	Objections:
20	Accelerated Vesting And Distribution.	Irrelevant to the issue of whether the
21		WAP is a top hat plan as defined under
22		29 U.S.C. §§ 1051(2), 1081(a)(3),
23		1101(a)(1).
24		
25		Irrelevant to the issue of whether the
		WAP was set up in bad faith in that it fails to address the vesting and
26		distributions of WAP benefits to
27		participants who are terminated without
28		cause.
[]	•	

1	<u>DEFENDANTS' ALLEGED</u>	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3	31. At its meeting on April 8, 2008,	DISPUTED.
l	the WAP Committee considered	DISFUTED.
4	Benhayon's appeal of its December 7,	First, as indicated at AA 303, the
5	2007 decision.	document is dated April 7, 2008 – not April 8, 2008.
7		Second, as indicated at AA 301, non-
8		WAP Committee members Gabriela
9		Sikich and Todd Schnell were present at the Committee meeting to review Steven
10		Benhayon's claim for benefits under the
11		WAP. As RBC has provided 24 blank
12		pages marked "REDACTED" and "CONFIDENTIAL," Plaintiff disputes
13		this alleged uncontroverted fact on the
14		grounds that if said minutes become
15		unveiled later in this litigation, Plaintiff submits that such minutes may
16		demonstrate that non-WAP Committee
17		members Gabriela Sikich and Todd
		Schnell participated in the review and decision of Steven Benhayon's claim for
18		benefits under the WAP. (AA 303; AA
19		301.)
20		Objections:
21		Objections.
22		Assumes facts not in evidence – to wit,
23		that the WAP is a "top hat" plan as defined under 29 U.S.C. §§ 1051(2),
24		1081(a)(3), 1101(a)(1). The WAP is not
25		a "top hat" plan as defined under 29
26		U.S.C. §§ 1051(2), 1081(a)(3),
27		1101(a)(1). First, the number of WAP participants far exceeds the amount of
28		employees permissible to constitute a
20		

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		"select group" under <i>Duggan v. Hobbs</i> ,
4		99 F.3d 307 (9th Cir. 1996), Darden v.
5		Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986) aff'd, 922 F.2d 203 (4th
		Cir. 1991), rev'd on other grounds, 503
6		U.S. 318 (1992), Pane v. RCA Corp.,
7		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
8		v. Rowe Furniture Corp., 571 F. Supp.
9		1249 (D.C. MD. 1983). Second, the
		WAP participants did not have the
10		necessary bargaining power to affect or
11		substantially influence the terms and
12	<u> </u>	conditions of the WAP under <i>Duggan</i> v.
Ì		Hobbs, supra, Carrabba v. Randalls Food Markets, Inc., 38 F.Supp.2d 468
13		(N.D. Tex. 1999). Third, the WAP was
14	,	not a completely "unfunded" plan as it
15		mandated contributions by its employee
16		participants (e.g., Mandatory Deferred
		Compensation), which were not
17		contributed by RBC, and did not come
18		from RBC's general assets, as required
19		under 29 U.S.C. §§ 1051(2), 1081(a)(3),
20		1101(a)(1), Belka v. Rowe Furniture Corp., 571 F. Supp. 1249, 1251 (D.C.
		Md. 1983), Miller v. Eichleay Engineers,
21		<i>Inc.</i> , 886 F.2d 30 (3d Cir. 1989), and
22		Crumley v. Stonhard, Inc., 920 F. Supp.
23		589 (D.C. N.J. 1996).
24	32. At its meeting on April 8, 2008.	DICHUTED
25	32. At its meeting on April 8, 2008, the WAP Committee affirmed its earlier	DISPUTED.
	decision to deny Benhayon's request to	First, as indicated at AA 303, the
26	accelerate vesting of the employer	document is dated April 7, 2008 – not
27	contributions in his WAP account.	April 8, 2008.
28		7
	20	9

1	DEFENDANTS' ALLEGED	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3	The state of the control of the state of the	Second, as indicated at AA 301, non-
4		WAP Committee members Gabriela
5		Sikich and Todd Schnell were present at
		the Committee meeting to review Steven Benhayon's claim for benefits under the
6		WAP. As RBC has provided 24 blank
7		pages marked "REDACTED" and
8		"CONFIDENTIAL," Plaintiff disputes
9		this alleged uncontroverted fact on the grounds that if said minutes become
10		unveiled later in this litigation, Plaintiff
11		submits that such minutes may
12		demonstrate that non-WAP Committee
13		members Gabriela Sikich and Todd Schnell participated in the review and
		decision of Steven Benhayon's claim for
14		benefits under the WAP. (AA 303; AA
15		301.)
16		Objections:
17		
18		Assumes facts not in evidence – to wit,
19		that the WAP is a "top hat" plan as
20		defined under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The WAP is not
21		a "top hat" plan as defined under 29
		U.S.C. §§ 1051(2), 1081(a)(3),
22		1101(a)(1). First, the number of WAP
23		participants far exceeds the amount of employees permissible to constitute a
24		"select group" under Duggan v. Hobbs,
25		99 F.3d 307 (9th Cir. 1996), Darden v.
26		Nationwide Mut. Ins. Co., 796 F.2d 701 (Ath Cir. 1986) affed 922 F.2d 203 (Ath
27		(4th Cir. 1986) <i>aff'd</i> , 922 F.2d 203 (4th Cir. 1991), <i>rev'd on other grounds</i> , 503
28		U.S. 318 (1992), Pane v. RCA Corp.,
~		

1	<u>DEFENDANTS' ALLEGED</u>	PLAINTIFF'S RESPONSE AND
2	<u>UNCONTROVERTED FACTS</u>	SUPPORTING EVIDENCE
3		868 F.2d 631 (3d Cir. 1989), and <i>Belka</i>
4		v. Rowe Furniture Corp., 571 F. Supp.
		1249 (D.C. MD. 1983). Second, the
5		WAP participants did not have the
6		necessary bargaining power to affect or
7		substantially influence the terms and conditions of the WAP under <i>Duggan</i> v.
8		Hobbs, supra, Carrabba v. Randalls
9		Food Markets, Inc., 38 F.Supp.2d 468
		(N.D. Tex. 1999). Third, the WAP was
10	}	not a completely "unfunded" plan as it
11		mandated contributions by its employee participants (e.g., Mandatory Deferred
12		Compensation), which were not
13		contributed by RBC, and did not come
14		from RBC's general assets, as required
15		under 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1), Belka v. Rowe Furniture
16		Corp., 571 F. Supp. 1249, 1251 (D.C.
		Md. 1983), Miller v. Eichleay Engineers,
17		Inc., 886 F.2d 30 (3d Cir. 1989), and
18		Crumley v. Stonhard, Inc., 920 F. Supp. 589 (D.C. N.J. 1996).
19		(D.C. 14.3. 1990).
20	33. Ms. Myron was notified of the	UNDISPUTED.
21	WAP Committee's decision regarding	
22	Benhayon's appeal of its December 7, 2007 decision by a letter from Mr.	Objections:
23	Schnell dated April, 9, 2008.	Irrelevant to the issue of whether the
	, , , , , , , , , , , , , , , , , , , ,	WAP is a top hat plan as defined under
24		29 U.S.C. §§ 1051(2), 1081(a)(3),
25		1101(a)(1).
26		Irrelevant to the issue of whether the
27		WAP was set up in bad faith in that it
28		fails to address the vesting and
-		

1 2	DEFENDANTS' ALLEGED UNCONTROVERTED FACTS	PLAINTIFF'S RESPONSE AND SUPPORTING EVIDENCE
3 4 5		distributions of WAP benefits to participants who are terminated without cause.
6		

PLAINTIFF'S RESPONSES TO RBC'S ALLEGED CONCLUSIONS OF LAW RBC Claims:

1. The decision of the RBC USA Wealth Accumulation Plan Committee (the "WAP Committee") denying Steven Benhayon's request for accelerated vesting and claim for benefits under the RBC U.S. Wealth Accumulation Plan (the "WAP") is reviewable in this Court only for an abuse of discretion.

Plaintiff responds:

As more fully argued in Plaintiff's concurrently filed Reply Brief Re: ERISA Issues herein, the decision of the WAP Committee denying Steven Benhayon's request for accelerated vesting and claim for benefits under the WAP is not reviewable in this Court only for an abuse of discretion. Rather, as a conflict existed within the WAP Committee, the appropriate standard of review is 'modified abuse of discretion" where the Court should factor in the conflict that existed within the WAP Committee.

RBC Claims:

2. The WAP Committee did not abuse its discretion in denying Steven Benhayon's request for accelerated vesting and claim for benefits under the WAP.

Plaintiff responds:

As more fully argued in Plaintiff's concurrently filed Reply Brief Re: ERISA Issues herein, the WAP Committee abused its discretion in denying Steven Benhayon's request for accelerated vesting and claim for benefits under the WAP in that Plaintiff was not terminated for gross or willful misconduct during his

Case 2:08-cv-06090-FMC-AGR Document 43-2 Filed 08/05/09 Page 33 of 33 Page ID